No. 05-1653

IN THE

Supreme Court of the United States

CHARLES T. WILSON, *et al.*,

Petitioners,

—v.—

AIRTHERM PRODUCTS, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

When the WARN Act provides, in the context of a sale of a business, that the seller's employee "as of the effective date of the sale shall be considered an employee of the purchaser immediately after the effective date of the sale," 29 U.S.C. § 2101(b)(1), is it the seller or the buyer who is responsible for providing notice under 29 U.S.C. § 2102 if 50 or more employees are not offered employment by the buyer?

LIST OF PARTIES

The petition for certiorari accurately identifies petitioners.

Respondent Airtherm Products, Inc., is an Arkansas corporation. It is a wholly-owned subsidiary of Airtherm Manufacturing Company, a Missouri corporation. There are no publicly held corporations that own 10% or more of the stock of Airtherm Manufacturing Company.

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Because the United States Court of Appeals for the Eighth Circuit properly resolved this appeal, *Wilson v. Airtherm Products, Inc.*, 436 F.3d 906 (8th Cir. 2006), and because there is no conflict among the Courts of Appeals, the petition for certiorari should be denied.

STATEMENT OF THE CASE

The question in this case, arising in the context of a sale of an on-going business, is who has responsibility—the seller or the buyer—to provide notice under the Workers Adjustment and Retraining Notification ("WARN") Act, 29 U.S.C. §§ 2101 *et seq.*, if (a) the workers at a plant remained employed by the seller as of the date of the sale, and (b) the buyer decides not to offer employment to 50 or more of them. The Eighth Circuit held that the buyer has the notice responsibility, because it is the one who decides how many workers continue in employment after the sale. Every other Court of Appeals that has considered the same question has decided it the same way. The plain language of the statute, ignored by petitioners, requires this result, as does common sense. There is no basis for a grant of a writ of certiorari in this case.

This case involves the sale of a manufacturing plant in Forrest City, Arkansas, from Airtherm Products, Inc. ("API"), to Airtherm LLC ("ALLC").[1] API retained the employees through the date of sale. Having sold the plant to ALLC, it terminated their employment under their collective bargaining agreement as of that date and paid their severance benefits.[2]

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[1] In order to avoid confusion, this brief adopts the abbreviations used by the Eighth Circuit in its opinion.

[2] Like every other Court of Appeals to consider the question, the Eighth Circuit held that the termination of a collective bargaining

Even though the Forrest City plant remained open after the sale, the WARN Act defines a "plant closing" to include "an employment loss . . . for 50 or more employees." 29 U.S.C. § 2101(a)(2). Employees are entitled to 60 days notice of a plant closing under 29 U.S.C. § 2102. However, § 2101 (b)(1) makes clear that the mere sale of a plant does not constitute a plant closing, and it assigns to the buyer responsibility for those workers who remained employed by the seller on the date of sale:

> After the effective date of the sale of part or all of an employer's business, the purchaser shall be responsible for providing notice for any plant closing or mass layoff. . . . [A]ny person who is an employee of the seller . . . as of the effective date of the sale shall be considered an employee of the purchaser immediately after the effective date of the sale.

Consistent with the plain language of the statute, ALLC contractually assumed all liability for WARN Act violations, if any. Consistent with its responsibilities, ALLC offered employment to the vast majority of API's employees.[3]

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agreement does not necessarily constitute termination under the WARN Act:

> [A] decision to technically terminate employment or close a plant to achieve a desired effect on labor relations does not answer the questions of whether there is a plant closing for purposes of the WARN Act or who has notification responsibility if a plant closing occurs. *See, e.g.*, [*International Alliance of Theatrical & Stage Employees v.*] *Compact Video Servs.*, [*Inc.*,] 50 F.3d [1464,] 1468 [(9th Cir.), *cert. denied*, 516 U.S. 987 (1995)].

Petn. App. at 12a n.4. Accord, *International Oil, Chem. & Atomic Workers v. Uno-Ven Co.*, 170 F.3d 779, 783-84 (7th Cir. 1999).

[3] Petitioners properly acknowledge that 74 of API's employees were hired by ALLC. Petn. at 4. They erroneously contest API's showing that only 123 workers were employed as of the date of sale.

Petitioner employees, many of whom both received severance benefits and continued in employment, brought this case against the seller. Their theory is that, because API terminated their employment on the day of sale, API had a duty to provide them with a WARN Act notice. They seek penalties for the failure to provide that notice, whether or not they suffered any actual economic loss. Petn at 18.

The Eighth Circuit followed the plain statutory language and held that, because the employees worked for the seller on the day of sale, they were deemed by § 2101(b)(1) to be employees of the buyer on the day after the sale, and so, at least for the purposes of the Act, the seller did not cause them to suffer an "employment loss" that required WARN Act notice. Petn. App. at 11a.

REASONS FOR DENYING THE PETITION

I. BECAUSE NO COURT OF APPEALS WOULD REQUIRE A SELLER TO GIVE NOTICE UNDER THESE CIRCUMSTANCES, THERE IS NO CONFLICT AMONG THE CIRCUITS.

In order to determine whether an actual conflict exists among the Courts of Appeals, this Court must first identify the question actually decided by the Eighth Circuit and presented by this petition. Leaving aside petitioners'

Petn. at 3 n.1. Although API had employed two additional workers within the prior sixty days, the record unequivocally shows that those two employees did not suffer an employment loss, having voluntarily resigned before the sale. Trial Transcript at 38. Because a resignation constitutes a "voluntary departure" within the meaning of § 2101(a)(6)(A), *Wiltz v. M/G Transport Services, Inc.*, 128 F.3d 657, 963 (6th Cir. 1997), all but 49 of API's covered employees were hired by ALLC.

somewhat tendentious description of the operative facts,[4] this case actually presents only the first question:

> 1. Must the seller give its employees 60 days notice of the termination?

Petn. at i. Petitioners' three remaining numbered questions all concern the obligations of the buyer; because the buyer, ALLC, has never been a party to this litigation, those questions are not properly presented by this petition. Petitioners' second set of questions, Petn. at i-ii, reflects their contention that the Eighth Circuit construed a rejected version of the WARN Act. Because, as demonstrated hereafter, the Eighth Circuit properly construed § 2101(b)(1) as adopted, these questions are not properly presented by this petition.

With regard to the question actually presented by this petition, petitioners have failed to demonstrate that any other Court of Appeals on these facts would require the seller to provide notice to its employees. The three cases on which petitioners rely are easily distinguished. Indeed, the Eighth Circuit cited as support for its rule the only two cases which actually discuss § 2101(b)(1).

Kalwaytis v. Preferred Meal Sys., 78 F.3d 117 (3d Cir. 1996), did not involve a sale of business at all. Probably for that reason, petitioners never cited the case in their Eighth Circuit briefs. The employer in that case did not sell its business, but claimed erroneously to have been a joint employer with the subcontractor that later hired its terminated employees. The Third Circuit expressly refused to consider precedents involving the sale-of-business exclusion. *Id.*, at 120. The Court did not impose WARN Act liability on the seller because there was no seller.

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[4] API believes that its counter-statement of the question presented more accurately reflects the issue actually before this Court.

An actual sale of an business was involved in *Headrick v. Rockwell Internat'l Corp.*, 24 F.3d 1272 (10th Cir. 1994), and the Tenth Circuit imposed no liability on the seller. In that case, the buyer assumed all of the seller's responsibilities, including an explicit assumption of its responsibility to its employees. *Id.*, at 1274 & n.3. Writing for the Court, Justice White found this explicit transfer of employment to the buyer sufficient to invoke the protection of § 2101(b)(1). *Id.*, at 1280-81. Neither the Tenth Circuit nor any other Court of Appeals has held such an explicit transfer to be necessary to invoke the protection of the sale-of-business provision.[5]

Indeed, petitioners themselves admit that the Ninth Circuit in *Compact Video Servs., supra,* "found no WARN Act liability on the part of the seller." Petn. at 14. It is true that the buyer notified most employees before the sale that they would be retained, but the Ninth Circuit expressly rejected such an argument as the basis of its decision:

> [N]othing in WARN requires a seller to insist upon a contract term guaranteeing its employees continued employment with the buyer. Had ATS simply decided not to hire any of the Compact employees at all, ATS, not Compact, would have had the responsibility for giving WARN notice.

50 F.3d at 1468. The Eighth Circuit explicitly relied on this language in holding that any notice requirement in this case would fall on the buyer, not the seller. Petn. App. at 11a.

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[5] The Eighth Circuit approved the Tenth Circuit's "functional common sense approach" in *Smullin v. Mity Enter., Inc.*, 420 F.3d 836, 839 (8th Cir. 2005), the opinion which adopted the "going concern" rule applied in this case.

Petitioners likewise concede, as they must, that the Eighth Circuit's exoneration of the seller in this case is consistent with holdings of the Sixth Circuit in *Wiltz, supra*, and the Seventh Circuit in *Uno-Ven, supra*. Because petitioners have utterly failed to identify any other Court of Appeals that would impose liability on API under these circumstances, there is no Circuit conflict justifying this Court's attention under its Rule 10(a).

II. THE EIGHTH CIRCUIT, LIKE ALL COURTS OF APPEALS, PROPERLY ASSIGNS NOTICE RESPONSIBILITY TO THE BUYER, BECAUSE THE BUYER DECIDES WHICH EMPLOYEES TO KEEP.

The law should be both clear and sensible. Companies need to know which party to a sale has the duty to give notice if 50 or more workers will lose their job. The seller does not know who the buyer will keep. The buyer may not even know who it will keep. However, the buyer is on notice under the law as interpreted by the Eighth Circuit and all other Courts of Appeals that, if it intends to leave more than 50 workers without a job, it must first give WARN Act notice. Once a seller has presented the buyer with a "going concern,"[6] including a workforce

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[6] Petitioners offer no good reason to reject the Eighth Circuit's conclusion that the failure of Congress to adopt a definition precisely describing the qualifying forms of conveyance indicated a broad scope for § 2101(b)(1):

> Congress instead used a more generic term, "sale of a business," which clearly connotes *any* transaction that transfers all or part of the employer's overall operations *as a going concern*. Construing the exclusion in this fashion is consistent with the purposes of the WARN Act because the buyer of a going concern is likely to retain a substantial proportion of the employees of the on-going business.

Smullin, 420 F.3d at 639 (emphasis in original). It is precisely the *Smullin* rule which the Eighth Circuit applied in this case. Petn. App. at 8a-9a.

employed on the date of the sale, it has qualified for protection under § 2101(b)(1).

Petitioners trudge through obscure legislative history in an attempt to overcome the plain language of the statute, which the petition never addresses. They discount Senator Metzenbaum's description of an earlier version of the legislation, Petn. at 14-15, but they do not mention his assurance that Senator Hatch's amendment, now codified as § 2101(b)(1), had merely "clarifie[d] our intent." 134 Cong. Rec. S 8680 (June 28, 1988). Tellingly, they offer no legislative history to support their contention that § 2101(b)(1) applies only when the seller transfers its employees "to the buyer's payroll at the time of the sale." Petn. at 20.[7]

Viewed from a distance, petitioners' claims are even more unsound. The continued operation of the plant with all but 49 of the same workers would not have constituted a WARN Act violation if the business had not been sold; a change of ownership makes no practical difference. This is precisely the reason that § 2101(b)(1) excludes the sale of a business from the definition of employment loss.

Here the business was sold as an ongoing operation. Not only did the employees work and get paychecks, but

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[7] Petitioners base this argument, not on conflicting decisions of other Courts of Appeals, but on dictum in an earlier Eighth Circuit opinion declaring that "when employees are transferred from seller to buyer as part of a sale, employees have not suffered an employment loss." *Burnsides v. MJ Optical, Inc.*, 183 F.3d 700, 702 (8th Cir. 1996). Neither *Burnsides* nor any other case has held that a buyer must assume contractual responsibility for seller's employees for the sale-of-business exclusion to apply. Although the Eighth Circuit noted in *Smullin* that "the timing of the plant closing on the day of sale became an issue in *Burnsides*," 420 F.3d at 840 n.2, that Court has now made clear in *Smullin* and this case that the seller's retention of its workforce on the payroll on the date of sale will transfer notice responsibility to the buyer under § 2101(b)(1).

they also got severance checks. In other words, they all got severance checks even though not all of them lost their employment. Despite this windfall to many, an artifact of the union agreement, they now seek to pile on WARN Act damages. Whatever Congress intended the WARN Act to do, it was not to provide a double windfall to employees who have kept their job.

CONCLUSION

There is no basis for certiorari in this case. The Courts of Appeals that have interpreted the statutory language have interpreted it correctly. There is no Circuit conflict. The reading the Circuits have given the statute accords with its plain language, makes common sense, and, to the extent it matters, is not contrary to any legislative history.

For these reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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